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No. 82-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DR. ETHEL MIGRA,

Petitioner,

v.

WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE STATE OF MARYLAND AND THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the doctrine of *res judicata* applies to Section 1983 claims in federal court which could have been but were not raised by a plaintiff in his prior state court action.

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INTEREST OF AMICI CURIAE

The State of Maryland is continually involved in state and federal court litigation brought against it involving common law and statutory claims and claims pursuant to Title 42 U.S.C. § 1983. In many of these cases the plaintiff could characterize his cause of action either as a common law/statutory violation or as a Section 1983 constitutional violation. Since this case concerns the application of *res judicata* to Section 1983 actions brought in federal court subsequent to a judgment in state court in which the same claim could have been litigated, the State has a significant interest in the Court's disposition of this issue.

In addition, the State of Maryland has a particular interest in the dispostion of this case as it has recently argued a similar issue before the United States Court of Appeals for the Fourth Circuit in *Kutzik v. Young, et al.*, No. 82-1264. The Fourth Circuit has withheld ruling on the issue pending the Court's decision in this case.

The American Council on Education is a voluntary membership organization composed of 1,355 non-profit institutions of higher education from both the public and private sectors and 178 educational associations.

SUMMARY OF ARGUMENT

There is nothing in the language of Section 1983, its legislative history, or in this Court's prior decisions to justify an exception to the doctrine of *res judicata* for a Section 1983 claim in federal court which could have been, but was not raised in a prior state court action. *See Allen v. McCurry*, 449 U.S. 90 (1980).

Moreover, application of the doctrine of *res judicata* serves several extremely important policies: conservation of judicial resources, preservation of the validity of prior judgments, fostering of respect for state courts, and avoidance of harassment of defendants. These policies would be undermined if an exception to the ordinary application of *res judicata* were created in this case. Parties would be encouraged to limit suits in state court to purely state claims in order to get a second "bite of the cherry" in federal court, should they not be *totally* satisfied with the state court result. This would result in piecemeal litigation rather than a consolidation of claims, a waste of judicial resources, increased time and expense to all parties, and a lack of certainty and finality to all litigation involving potential Section 1983 defendants. On the other hand, application of the doctrine of *res judicata* in this case would encourage judicial economy without in any way sacrificing individual rights.

ARGUMENT

Under the doctrine of *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action. *Cromwell v. County of Sac*, 94 U.S. 351 (1877) cited in *Allen v. McCurry*, 449 U.S. 90 (1980). *Res judicata* "is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946). The doctrine "reflects the refusal of law to tolerate needless litigation." *Angel v. Bullington*, 330 U.S. 183, 192-193 (1947).[1] Subsequent litigation is needless if, by fair process, a party over whom the court had jurisdiction had *an opportunity* to raise issues that were a part of the cause of action previously dealt with. *Angel v. Bullington, supra; Heiser v. Woodruff, supra.*

Although Petitioner and the *amici* admit that traditional principles of collateral estoppel apply fully to litigants in Section 1983 actions, they argue that traditional principles of *res judicata* should not apply to such litigants. This argument is made even though this Court has recognized collateral estoppel and *res judicata* are related doctrines based on essentially identical policy considerations:

> Indeed, from *Cromwell v. County of Sac*, 94 U.S. 351 (1877), to *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) this Court has consistently emphasized the importance of *the related doctrines of*

[1] State court judgments traditionally have been accorded full preclusive effect in federal suits initiated under the general federal question statute, 28 U.S.C. § 1331 (1976). *Angel v. Bullington, supra; Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930).

> *res judicata and collateral estoppel* in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. (emphasis added).

Kremer v. Chemical Construction Corporation, ___ U.S. ___, 102 S. Ct. 1883 at 1889-90 n. 6 (1982). Accordingly, the position maintained by the Petitioner and *amici* herein, is unsupportable on legal or public policy grounds.

First, there is no justification for an exception to the traditional principles of *res judicata* based on the wording of the statute or on the legislative history of Section 1983. As this Court noted in *Allen v. McCurry*, 449 U.S. 90 (1980):

> . . . nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738. . . . Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.
>
> Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion . . . [I]n the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and *res judicata*. Since repeals by implication are disfavored, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S. Ct. 1989, 1993, 48 L. Ed. 2d 540, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.

449 U.S. at 97-99. (footnotes omitted).

This holding was reaffirmed by this Court last year in *Kremer v. Chemical Construction Corporation*, ___ U.S. ___, 102 S. Ct. 1883 (1982).[2]

Second, there is no basis for an assertion that state courts cannot competently and fairly decide constitutional issues. The debates accompanying the Section 1983 legislation indicate that Congress was well aware of the extreme times in which it was acting and anticipated that the states, consistent with the constitutional scheme, would resume administration of federal civil rights law in their own courts. *Allen v. McCurry, supra* at 100 n. 16. Present circumstances provide no reason to doubt that state courts are capable of acting in accordance with federal principles. According to this Court, state and federal courts are equally competent to decide federal claims even when those claims concern objections to official state action. As noted by this Court in *Stone v. Powell*, 428 U.S. 465, 493-494 n. 35 (1976):

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states.

[2] Furthermore, it appears from a footnote in *Kremer* that this Court deemed *res judicata* to preclude relitigation of an issue which the plaintiff *could* have raised in the prior state proceedings. Kremer had alleged national origin discrimination before the EEOC and in his Title VII suit, but failed to raise this allegation in his prior complaint filed with the state. After noting that Kremer did not argue that his national origin claim was different from his state claim of religious discrimination, this Court stated:

> Of course, if Kremer desired to make such a claim, he was obligated to first bring it before the NYHRD. Moreover, "[a] party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding."

102 S. Ct. at 1889 n. 4 (citations omitted).

And in *Allen v. McCurry, supra*, distrust of a state forum was dismissed as a possible justification for refusal to apply the doctrine of collateral estoppel because of this Court's faith in state forums.

Third, Section 1983 guarantees only the *choice* of a federal forum for constitutional challenges. "Choice of forum" means the initial election between forums that a litigant makes when he decides to sue, not access to a federal forum *after* the case has been litigated in state court. *Allen v. McCurry, supra* at 103-105 (1980). Of course, if a plaintiff brings his action in federal court he may do so without waiving the right to present his state based claims — the federal court can give pendent jurisdiction to the state claim.[3] Similarly, if a plaintiff chooses to proceed in state court with his cause of action, he may litigate his Section 1983 claim as well. *Maine v. Thiboutot* 448 U.S. 1 (1980).[4] However, once having choosen his forum — either state or federal — a claimant should not be permitted to later relitigate another portion of his claim in a different forum, just because he is dissatisfied with the first result.

Fourth, and perhaps most important, the public policies which underpin the doctrine of *res judicata* support its application in this case. Those policies are conservation of judicial resources, preservation of the validity of prior judgments, fostering of respect for the rendering state

[3] The rationales for *res judicata* also support the doctrine of pendent jurisdiction. It permits parties to resolve state and federal claims arising from the same factual situation in a single forum, thereby reducing litigation costs and the possibility of inconsistent judgments. In fact, if a plaintiff omits a related state claim from his initial federal suit and later asserts it in state court, the *Restatement* (second) of Judgments § 87(a)(1) requires that if the state court determines that the federal court would have exercised its pendent jurisdiction and heard the claim, *res judicata* bars the plaintiff in the second action.

[4] Of course, relitigation is always available if a Section 1983 plaintiff was not afforded a "full and fair opportunity" to try his claim in the state court. *Allen v. McCurry, supra.*

court, and avoidance of inconvenience to and harassment of defendants by piecemeal litigation. *See State of Montana v. United States* 440 U.S. 147 (1979); *Younger v. Harris* 401 U.S. 37 (1971). If the Court were to find in favor of Petitioner, the effect would be to encourage multiple law suits in state and federal court arising out of the same cause of action. Many common law claims may be described alternatively as constitutional violations. *See Bennun v. Board of Governors of Rutgers,* 413 F. Supp. 1274 (D.N.J. 1976) (denial of tenure challenged in state court as negligence and malicious interference, and in federal court as denial of due process and national origin discrimination); *Davis v. Towe,* 379 F. Supp. 436 (E.D. Va. 1974), affirmed, 526 F.2d 588 (4th Cir. 1975) (action in state court for false arrest and false imprisonment, and in federal court for deprivation of constitutional rights protected by the Fourth and Sixth Amendments); *Howe v. Brouse,* 422 F.2d 347 (8th Cir. 1970) (action against judge in state court for improper conduct brought in federal court as a violation of civil rights); *Spence v. Latting,* 512 F.2d 93 (10th Cir. 1975) (dismissal from employment without a hearing challenged in state court as violation of state statute and in federal court as a denial of due process).

Multiple litigation of the same cause of action would be encouraged in virtually every case. A plaintiff who was unsuccessful in state court on his common law claims would know that a "second bite at the cherry" was available in federal court.[5] Further, as this pending case

[5] This is precisely the situation pending before the United States Court of Appeals for the Fourth Circuit, in *Kutzik v. Young, et al.* No. 82-1264. Plaintiff, therein, initially filed a claim in state court against state officials alleging that the termination of his employment was in breach of contract. Losing in state court, plaintiff thereupon filed a suit in federal court, pursuant to 42 U.S.C. § 1983, alleging that the termination of his employment was in violation of his due process, equal protection and First Amendment rights. Clearly, plaintiff's federal claim embraces the same facts as his state claim and as such should be barred.

amply demonstrates, even a plaintiff who prevailed in state court might well renew his litigation in federal court in an attempt to get a greater monetary award or broader injunctive relief. In fact, a plaintiff would be likely to file suit simultaneously in state and federal court knowing that an adverse judgment in state court would not bar the federal claim. This would result in piecemeal litigation rather than a consolidation of all claims, a waste of judicial resources, increased time and expense to all parties, and a lack of certainty and finality to all litigation involving potential Section 1983 defendants. The role of *res judicata* should not be diminished because a plaintiff alleges a violation of his constitutional rights in federal court; "state courts, too are the guardians of the federal constitution." *Lovely v. Laliberte*, 498 F.2d, 1261, 1263 (1st Cir. 1974).

To eliminate abuse and inefficiency, the federal courts should apply the doctrine of *res judicata* to Section 1983 claims which could have been raised when a plaintiff filed his state court action. It is clearly desirable as a matter of policy that litigants with civil rights claims be afforded *one*, and only one, full and fair proceeding in which to vindicate their rights. Application of this doctrine encourages judicial economy without sacrificing individual rights.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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